73-377

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-377

MAURICE S. OSSER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MAURICE S. OSSER,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Maurice S. Osser, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Opinions Below

The opinions of the District Court and the Court of Appeals appear in the Appendix as Exhibits A and B, pp. 12-47.

Jurisdiction

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Pennsylvania on

seven counts of mail fraud under 18 U.S.C. §1341 and §1342; one count of conspiracy under 18 U.S.C. §371; and one count of endeavoring to obstruct justice under 18 U.S.C. §1510. From this judgment filed December 21, 1972, petitioner appealed to the United States Court of Appeals for the Third Circuit which affirmed the conviction in a judgment entered July 30, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Whether the trial court's decision to admit into evidence the taped telephone conversation between the petitioner and a named co-conspirator was reversible error as violative of petitioner's sixth amendment rights.

2. Whether the trial court's decision to admit into evidence the taped telephone conversation as substantive rather than corroborative evidence was reversible error.

Constitutional and Statutory Provisions

The relevant Constitutional and statutory provisions, appear in the Appendix as Exhibit C p. 48 and include the sixth amendment of the United States Constitution, and 18 U.S.C. §§ 1341, 1342, 371 and 1510.

Statement of the Case

Petitioner Maurice S. Osser served as a County Commissioner (title later changed to City Election Commissioner) in Philadelphia for more than two decades. During early 1972, a federal grand jury investigated various frauds on the city during Osser's term of office. The grand jury indicted Petitioner on February 25, 1972, for involvement in fraudulent schemes to rig contracts for election machines. That indictment, as amended May 17 and May 24, 1972,

led to a trial (District Court No. 72-349) in the Eastern District of Pennsylvania which preceded the trial of the indictment involved in the present case.

Following presentment of the first indictment, the grand jury continued to hear evidence against Osser. In March 1972, it subpoenaed Leon Freedman in connection with an investigation of rigging of city council minutes and election ballot printing contracts. Freedman originally invoked the fifth amendment at the hearing, but later decided to cooperate with the Government after receiving a promise of immunity.

On May 17, 1972, Freedman received a telephone call from Petitioner. Osser, unaware that Freedman had already decided to cooperate with the Government, urged him not to mention Osser's name to the grand jury. Later on May 18, Freedman and his attorney met with a Department of Justice attorney and reported Osser's contacts with Freedman. The Government attorney asked Freedman if the Government could tape the expected phone call from Osser, and Freedman agreed. He was instructed how to operate a transmitter placed on his person, and had a recorder installed on his store phone.

Petitioner called Freedman on May 19, pleading with him not to tell the Government of their previous commission splitting practices. The tape of the Freedman-Osser conversation was introduced by the Government in the trial below. Freedman did not testify as to the content of this telephone conversation, but merely identified the tape recording. Counsel for Petitioner made timely objection to the admission of such evidence relying on several grounds including the failure of the court to follow the correct procedure of requiring the witness to give his personal recollection of the conversation before introducing the tape as corroboration. Instead, the court permitted the

tape to be introduced as substantive evidence, following a hearing on a motion to suppress.

The trial below, in which the taped conversation was introduced, followed an indictment against Petitioner returned by the grand jury on June 28, 1972, charging nine counts of mail fraud, 18 U.S.C. §§ 1341, 1342, and one count of conspiracy 18 U.S.C. §371, for his alleged involvement in rigging city printing contracts, and one count of endeavoring to obstruct justice, 18 U.S.C. §1510, based on his entreaties to Freedman. Under this indictment (District Court No. 72-384), two mail fraud counts were dismissed, while the jury returned guilty verdicts on the other nine counts. Petitioner was sentenced to two consecutive three year terms and fined $19,000.00. On appeal to the United States Court of Appeals for the Third Circuit, the judgment was affirmed on July 30, 1973.

Reasons for Granting the Writ

1. Application by This Court of the Doctrine in *Massiah v. United States* to the Facts of This Case is Necessary to Avoid Governmental Circumvention of Sixth Amendment Guarantees by Spreading Related Indictments Over Time.

In our adversary system, the right to the effective assistance of counsel, *McGuire* v. *United States*, 289 F.2d 405, 409 (9th Cir. 1961) is a fundamental prerequisite, *U.S. ex rel. Platts* v. *Meyers*, 253 F. Supp. 23 (D. Pa. 1966), of due process guaranteed by the sixth amendment, a safeguard deemed necessary to insure the basic rights of life and liberty. *Glasser* v. *United States*, 315 U.S. 109, (1942); *Miranda* v. *Arizona*, 384 U.S. 436 (1966). More than any other right guaranteed by the Bill of Rights regarding the function of justice, the right to counsel is paramount, for

it is the medium through which all other guarantees are made a reality. *Steadman* v. *Duff*, 302 F. Supp. 313 (D. Fla. 1969). The purpose of the sixth amendment is to guarantee the accused the guiding hand of counsel at every step of the proceedings, *Potter* v. *Dowd*, 146 F.2d 244 (7th Cir. 1944), at all times *United States* v. *McIntyre*, 396 F.2d 859 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1054 (1969), but certainly at every critical phase thereof, *Coleman* v. *Alabama*, 399 U.S. 1 (1970).

In *Massiah* v. *United States*, 377 U.S. 204 (1964), defendant was indicted for drug possession, pleaded not guilty, and was released on bail. A few days later, co-defendant Colson decided to cooperate with the continuing poice investigation into Massiah and Colson's drug activities. Colson permitted Goverment agents to install a transmitter in his automobile and subsequently held a lengthy conversation with Massiah in the car. The tape of the conversation was introduced into evidence at Massiah's trial.

The Court held that Massiah had been deprived of his sixth amendment right to counsel and quoted with approval the constitutional rule followed by New York that *any secret interrogation by the defendant after the indictment in the absence of counsel "contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." Massiah, supra* at 201. This Court in *Massiah* also pointed to its declaration in the leading case of *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932), that defendants are as much entitled to aid of counsel during the most critical period of the proceeding, i.e., in the preparatory period beginning with arraignment, as during the trial itself.

The Supreme Court relied heavily upon *Massiah* in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), observing that to abandon the *Massiah* rationale would make the formal trial a mere hollow appeal from the conviction assured by

pre-trial interrogation. More recently, this Court in *United States* v. *Wade*, 388 U.S. 218, 226-27 (1967) referred to the constitutional principle enunciated in *Massiah* and held that "in sum the principle . . . requires that we scrutinize *any* pre-trial confrontation of the accused to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial . . . .". Since *Wade*, the federal courts have followed the Supreme Court's directive to scrutinize *any* pre-trial confrontation of the accused to determine whether counsel is necessary to insure a fair trial. Thus, the *Massiah* rule has been extended to embrace post-arrest electronic surveillance, *United States* v. *Holmes*, 452 F.2d 249 (7th Cir. 1971), and protects as well a defendant who has not yet been indicted but who has merely reached the "probable cause hearing" stage of the criminal proceedings against him. *United States* v. *Yeager*, 415 F.2d 779 (3rd Cir. 1969).

In light of the sixth amendment concern for the presence of counsel at "any critical stage of the proceeding" as well as the concern for the defendant's basic right to a fair trial, the conversation between Petitioner Osser and Mr. Freedman should not have been recorded by the Government either openly or surreptitiously in the absence of defendant's counsel. Scrutiny of the "pre-trial confrontation" between Petitioner and Freedman, as the Government's agent, should lead this Court to apply the *Massiah* protection as initially attaching to the first indictment (No. 72-349) and extending to the closely related second indictment (No. 72-384). The eavesdropping occurred on May 19, 1972 between the dates of these indictments, merely two days after the final amendment of the first charges.

In refusing to apply the *Massiah* rule to the defendant's case, both the trial court and the appellate court relied primarily on *Hoffa* v. *United States*, 385 U.S. 293 (1966). The Supreme Court determined in *Hoffa* that if the in-

dictments were different in scope and subject matter, the *Massiah* doctrine would not apply to secretly recorded conversations or statements obtained by consent of one of the parties and relating to the later indictment if such recordings are admitted into evidence in the trial of the later indictment. But such reliance on *Hoffa* is misplaced; the relevant indictments in Petitioner's cases do not differ from each other in any way comparable to the clearly distinct indictments in the *Hoffa* cases. James Hoffa, in the original "Test Fleet" trial, faced charges of violating a provision of the Taft-Hartley Act, while the subsequent indictment was for endeavoring to bribe members of that jury. The offenses involved different crimes, different parties, different time periods, and different activities. Likewise, in *Vineyard* v. *United States*, 335 F.2d 176 (8th Cir.) *cert. denied*, 379 U.S. 930 (1964), also relied upon by the courts below, wherein the defendant was charged with refilling liquor bottles and attempted bribery, the same striking differences appear.

The indictments in the Osser cases are cut from the same block of wood. Indeed, it should be noted that this Court in *Hoffa* explicitly drew attention to the failure of the facts in *Hoffa* to fit the hypothetical situation in which the "Government's previous activities in undermining a Defendant's Sixth Amendment rights in one trial would make evidence obtained thereby inadmissible in a different trial on other charges." 385 U.S. at 306. In the instant case the charges of the indictment, particularly Counts I - X thereof, were substantially related in both time and subject matter to the allegations of the first indictment. Both indictments include charges of mail fraud and conspiracy. The fact that James Dunlap appears as a possible co-conspirator both in the first indictment and in the instant indictment should weigh heavily in the Court's mind, particularly since there was a period of seven years, from

1965 to 1972, when the activities of the Petitioner referred to in both indictments were occurring simultaneously. Underlying the entire sweep of the Government's pursuit of Petitioner is the basic fact that all of the charges share a common nexus — the alleged abuse of office by Mr. Osser while County Commissioner.

This Court should grant a writ of certiorari in order to prevent the development of a significant loophole in the *Massiah* doctrine: otherwise the Government could always separate multiple charges in related criminal activity, indict on some charges, continue investigations on the other charges and thus collect uncounseled statements from the defendant. Unless the umbrella of the sixth amendment is opened wide enough to shelter Petitioner from the prejudicial admission into evidence of the taped conversation, law enforcement agents will be able to exploit the eavesdropping potential of the initial indictment by gathering incriminatory statements made without counsel to be used when the related charges are subsequently brought.

It is hard to believe that a Supreme Court which voiced the warning in *Massiah* and *Escobedo* that law enforcement officers may not secure concessions from an accused which circumvent the protections a lawyer might provide, would at the same time allow the Government to evade this prohibition by merely delaying the formal institution of the related charges.

The record in this case shows that the Special U.S. Attorney prosecuting the defendant knew about the instant indictment at least as early as May 19th, 1972, the date for which he authorized the eavesdropping. Thus, he must have been aware of the close relationship between these charges and the ones brought previously on May 17th, 1972, for which the defendant had already retained counsel, a fact also known by the prosecutor. It has been stipulated that prior to the eavesdropping, statements of the five chief

Government witnesses had already been obtained and that these facts would have been presented to a Grand Jury for a return of the instant indictment reflecting Counts I through X, whether or not the telephone call in question had occurred. Furthermore, unlike the scenario in the *Hoffa* cases where the second indictment was promulgated after the first trial, the instant indictment came down prior to the commencement of the trial of the first indictment.

The Petitioner submits that, under these circumstances, the spirit of *Massiah* is violated and its doctrine should have been applied to the suppression of the taped telephone call as well as to any other evidence tainted by this poison. *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Petitioner urges this Court to grant a writ of certiorari in order to preserve the viability of the sixth amendment guarantees where multiple charges arise out of related criminal activity.

2. This Court Should Clarify Its Opinion In *United States v. White* as it Relates to Whether Recorded Conversations Between Informant and Defendant are Admissible as Substantive Evidence or Only as Corroborative Evidence.

In *United States* v. *White*, 401 U.S. 745 (1971), defendant was convicted of several narcotics violations. A Government informer posing as the defendant's friend was wired with a radio transmitter which permitted Government agents to record incriminating statements. During the trial the consenting Government agent himself did not testify, but the transcripts of the intercepted conversations between the defendant and the Government agent were nevertheless admitted into evidence against the defendant. The Supreme Court's opinion was principally concerned with whether the defendant's fourth amendment rights had

been violated by the electronic surveillance. When the case had been appealed below to the Seventh Circuit, 405 F.2d 838 (7th Cir. 1969), the Court of Appeals reversed the district court conviction relying on *Katz* v. *United States*, 389 U.S. 347 (1967), which held that a violation of the fourth amendment prohibition against unreasonable searches and seizures need not be a physical trespass and that the proper analysis was to determine whether the person being searched had a justifiable reliance on privacy. However the Supreme Court in *White* was forced to overturn the action of the Seventh Circuit because a technical error had been committed in applying *Katz* retroactively rather than prospectively only. *See Desist* v. *United States*, 394 U.S. 244 (1969).

Even so, this was the only point of law a majority of this Court could agree upon. As recognized by the district court in *Bakes* v. *United States*, 350 F. Supp. 547 (N.D. Ill. 1972), the question whether the transcripts were admissible as substantive rather than corroborative evidence was specifically left open by the Supreme Court in *White*. This is true despite the Third Circuit's discussion in the final paragraph of its opinion in the Osser case below where the Court of Appeals quoted language in *White* which deals with the fourth amendment admissibility of the transcripts rather than the *way* in which they may be admitted. Indeed, the Supreme Court's own language in *White* demonstrates this point:

> [The informant's] unavailability at trial and proffering the testimony of other agents *may raise evidentiary problems* or pose issues of prosecutorial misconduct with respect to the informer's disappearance but they do not appear critical to deciding whether prior events invaded the defendant's Fourth Amendment rights. (emphasis added). 401 U.S. at 754.

Similarly, in *Lopez* v. *United States*, 373 U.S. 427 (1963), this Court suggested without so holding that recordings of intercepted conversations may be admissible only as corroborative evidence. In that case, since the Government agent testified to the conversation with the defendant which was the subject of the recording, "the question whether there may be circumstances in which the use of such recordings in evidence should be limited to purposes of 'corroboration' is not presented by this case." 373 U.S. at 440 n. 12.

Petitioner's case provides this Court with a ripe opportunity to rule finally on this important question. During the trial, the informant, Leon Freedman, did not testify on the subject matter of the recorded conversation but merely identified the tape. The recording itself was introduced as substantive evidence. Counsel for Petitioner properly preserved this point for appeal by making timely objection and by standing to the trial court, "I submit that the correct method would be to ask the witness what his personal recollection is of the tape recording." This Court should grant a writ of certiorari in order to rule definitively on the issue whether tapes of electronic surveillance can be admitted as substantive evidence or must be limited to corroboration.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX: EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 72-384

UNITED STATES

v.

MAURICE S. OSSER

MEMORANDUM OPINION AND ORDER
December 18, 1972

VANARTSDALEN, J.

Maurice S. Osser was convicted by a jury on seven counts of mail fraud under 18 U.S.C. §1341 and §2; one count of conspiracy under 18 U.S.C. §371; and one count of endeavoring to obstruct justice under 18 U.S.C. §1510. Two additional counts of mail fraud were dismissed by the court at the conclusion of the government's case because the evidence disclosed that the alleged mailings pertaining to those two counts occurred more than five years prior to the date of the return of the indictment.

Defendant raises four issues in the motion for new trial. First, defendant contends that an electronically transcribed telephone conversation between defendant and an unindicted named co-conspirator, Leon Freedman, obtained by the government investigating agents with the full cooperation of Leon Freedman, was improperly received in evidence. Second, defendant asserts that the evidence was insufficient "with regard to the use of the mails in the alleged scheme to defraud." Third, defendant maintains that he was entitled to a charge that before he could be found guilty, the jury must find that the use of the mails was an *integral* part of the scheme to defraud. Finally, the motion claims that the charge in its entirety unduly

prejudiced the defendant (although no such contention was made at the trial at the conclusion of the charge).

In reference to the taped telephone conversation, a pretrial motion to suppress was filed and a full hearing held. The motion was denied. The defense contends that the conversation was recorded in violation of the defendant's Fourth Amendment rights (unlawful search and seizure) and his Sixth Amendment rights to counsel. Defense primarily relies upon the doctrine of *Massiah* v. *United States*, 377 U.S. 201 (1964).

The Fourth Amendment rights depend upon whether Leon Freedman voluntarily and freely without undue governmental pressure consented to have recorded the telephone call from the defendant to him at his place of business. Utilization of government agents or of a person acting in an undercover capacity for the government and recording conversations by such person with a defendant has been expressly permitted by the Supreme Court. *United States* v. *White*, 401 U.S. 745 (1971); *Lopez* v. *United States*, 373 U.S. 427 (1963); *Rathbun* v. *United States*, 355 U.S. 107 (1957). The Crime Control Act of 1968, 18 U.S.C. §2511(2)(c), provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Thus "consensual wiretapping" has been given statutory recognition by the negative wording of making such practice "not unlawful."

The cases all revolve around what constitutes consent, or more accurately, what amount of governmental coercion is sufficient to vitiate the "consent." A review of the record developed at the suppression hearing establishes

conclusively that the consent of Leon Freedman was properly obtained and was not in violation of any Fourth Amendment rights of the defendants. The facts, as established at the suppression hearing wherein there was submitted, *inter alia*, by agreement of counsel the transcript of an *in camera* hearing held before Honorable Daniel H. Huyett, 3rd, of this court, on October 4, 1972, in connection with other charges against Maurice S. Osser, will be briefly summarized.

Leon Freedman, pursuant to a subpoena, appeared before a federal grand jury in March of 1972. At that time he refused to answer questions claiming his Fifth Amendment right (14).[1] Mr. Freedman then retained an attorney and after subsequent conversations between Mr. Freedman, his attorney and the government, oral agreement was reached in late March or early April that Mr. Freedman would testify and would be granted governmental immunity (15-16). Subsequent to such firm agreement, Mr. Freedman's attorney, on May 18, 1972, advised George Kelly, Esquire, an attorney for the government in its investigation that Mr. Osser had frequently been telephoning and contacting Mr. Freedman and making inquiry about the investigation and Mr. Freedman's status in regard to the investigation (64). A conference between Mr. Freedman and his attorney and Mr. Kelly was held that afternoon (65). At that meeting Mr. Kelly proposed the recording of a future telephone conversation between Mr. Osser and Mr. Freedman (35). Before making such a proposal, however, Mr. Kelly said to Mr. Freedman in the presence of Mr. Freedman's attorney:

> [W]hat I am about to ask you has no bearing whatsoever on your immunity or the . . . deal that we reached

[1] The numbers appearing in parentheses refer to the Notes of Testimony page of the transcript of the *in camera* hearing held October 4, 1972, before Hon. Daniel H. Huyett, 3rd.

already. It will not have any effect as to whether or not you will receive immunity. This is your decision to make and whether you turn us down or whether you accept it, will have no bearing. (66)

Mr. Freedman immediately thereafter consulted privately with his attorney and then agreed that a future telephone conversation could be recorded (66). It was decided that Mr. Freedman would not initiate the call to Mr. Osser but would merely have recorded a telephone call that would be received from the defendant. Arrangements were then made to install the needed equipment. Mr. Freedman fully corroborated Mr. Kelly's testimony, and testified that no governmental pressure was placed upon him (21); that Mr. Kelly told him that he did not have to cooperate if he did not want to (21); that his decision would in no way affect the prior agreement to grant him immunity (21); that he, Mr. Freedman, felt that the decision was left entirely up to him and that it was his own judgment to agree to the tape recording (22); that he was not afraid that the government would do anything to adversely affect his interests if he did not agree (22-23); that although he had not been officially granted immunity by the court, he had no concern or doubt that it would be granted (36). Mr. Freedman was in no way advised by the government agents what to say or how to handle the conversation (29, 30, 40); although he was instructed as to how to use the recording equipment.

Defense counsel relies upon *Weiss* v. *United States*, 308 U.S. 321 (1939) and subsequent cases defining the nature of the consent required to intercept telephone conversations by constitutionally permissible means. In *Weiss* there was no prior consent for the taping of the telephone conversation. One of the defendants who had been a party to the telephone conversation entered a plea of guilty; he then, at the trial of the other defendant identified and

verified the accuracy of the transcript of an illegally obtained wiretap. This evidence was held inadmissible. Later cases have indicated that an implied promise of lenieney will vitiate consent granted by one of the parties to the conversation. *United States* v. *Laughlin*, 222 F. Supp. 264 (D.D.C. 1963). Although mere hope of lenieney alone may not be sufficient to negate consent, police coercion combined with the hope of lenieney will invalidate consent. *United States* v. *Zarkin*, 250 F. Supp. 728 (D.D.C. 1966). In the present case there was neither coercion, nor any promise of future lenieney. Mr. Freedman's cooperation and consent were purely voluntary. He had nothing to gain or to lose by consenting to the recording being made.

The record shows that the consent was validly obtained. Although official immunity had not yet been granted to Mr. Freedman, both the government attorney, Mr. Kelly, and the co-conspirator, Mr. Freedman, testified that there was never any suggestion that immunity would be contingent upon whether Mr. Freedman agreed to the conversation being recorded. The government had agreed to grant the immunity based on statements previously made by Mr. Freedman to the investigators. Defense counsel's argument that such an agreement would not be effective until there was a formal grant of immunity by the court is not acceptable. No court should or would permit the government to renege on such an agreement, even should it seek to so do.

The case of *United States* v. *Jones*, 433 F.2d 1176 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 950 (1971), is factually somewhat similar to the present case. In *Jones*, involving the "Bobby Baker case", the court determined that the consent was validly obtained even though the government suggested that the informant call the defendant and, on instructions from the government the informant encouraged the defendant to believe that he, the informant would

cooperate with the defendant. Also, the informant had been expressly refused a prior request for a grant of immunity. In the present case, immunity was not a mere hope or contingency, for which consent to have the telephone call monitored might be a hoped for "quid pro quo". Immunity was an established reality for Leon Freedman as of the time of the consent. As stated in *Zarkin, supra*, "so long as pressure is not initiated by the police for purposes of overbearing the will of the party, this Court does not believe the authorization given by the party is involuntary." *Id.* at 737. *See also, United States* v. *Hudson*, 429 F.2d 1311 (5th Cir. 1970), *cert. denied*, 402 U.S. 965 (1971) (Mr. Justice Douglas, dissenting).

The testimony at the trial fully revealed to the jury all of the circumstances surrounding the taking of the taped telephone conversation as bearing on Mr. Freedman's credibility. The jury was also expressly instructed that although the recording was received into evidence, before it could be considered by the jury at all, the jury would first have to determine whether or not Mr. Freedman freely and voluntarily consented to have the conversation recorded. The jury was further instructed that if it should find that Mr. Freedman was coerced or compelled into having the conversation recorded, then such recording would have been improperly obtained by the government and the jury would have to disregard the recording altogether in reaching its verdict. Also, since the taped conversation dealt primarily with the "endeavoring to obstruct justice" charge, the possible defense of entrapment in regard to the telephone conversation was also submitted to the jury. I find no violation of the defendant's Fourth Amendment rights by reason of the telephone conversation being admitted into evidence.

Massiah v. *United States, supra*, laid down the rule that a post indictment taped telephone conversation obtained

in the absence of retained defense counsel violated the defendant's Sixth Amendment rights. The court held that investigating officers eliciting information from a defendant through the use of a taped telephone conversation of the defendant, after indictment was obtained, was at such a critical stage of the criminal proceeding that, if taken in the absence of defense counsel, introduction of such evidence at the trial would violate the defendant's Sixth Amendment rights. The short and obvious answer to the *Massiah* rule is that the defendant in the present case had not been arrested, was not in custody, had not been indicted on the charges on which he was tried and convicted and was under no restraint or compulsion to make the statement as of the time of the taped telephone conversation. The proceedings were not yet at such a critical stage as to require counsel to be present.

Defense, however, contends that as of the time of the taping of the telephone conversation, defendant had been indicted on other charges, and had engaged counsel in connection with those other charges, which were so closely related factually to the present charges as to come within the *Massiah* rule. Again, however, this problem has been answered by the Supreme Court in *Hoffa* v. *United States*, 385 U.S. 293 (1966). The court determined in *Hoffa* that if the indictments were different in scope and subject matter, the *Massiah* doctrine would not apply to secretly recorded conversations or statements obtained by consent of one of the parties and relating to the later indictment and admitted into evidence in the trial of the later indictment. The *Hoffa* doctrine applies in this case. *See also*, *Vinyard* v. *United States*, 335 F.2d 176 (8th Cir.), *cert. denied*, 379 U.S. 930 (1964).

The pending indictment for which Mr. Osser had engaged counsel at the time of the telephone conversation charged the defendant with interference with commerce by threat

or violence and conspiracy under 18 U.S.C. §1951, and mail fraud under 18 U.S.C. §1341. In essence, that indictment charged that the defendant along with Thomas McHenry of the Shoup Voting Machine Corporation conspired from January 1965 to January 1972 to obstruct and affect commerce by extortion through the purchase or voting machines for the City of Philadelphia. In that eighteen count indictment, James Dunlap is named with respect to one overt act in one count in the alleged extortion violation of 18 U.S.C. §1951. The mail fraud involved the mailing of invitations to bid awards to the Shoup Voting Machine Corporation and the mailing of bids to the Procurement Department of the City of Philadelphia.

The present indictment under which Mr. Osser stands convicted involved mail fraud and conspiracy and endeavoring to obstruct justice. The named unindicted coconspirators are Fred Weiss and Leon Freedman. The alleged conspiracy occurred between 1956 and 1972 in which it is charged that Mr. Osser as City Commissioner joined with the other conspirators whereby there would be fraudulent bidding for printing contracts, the essence of the scheme being that by "rigging bids," Weiss Printing House would obtain all of the official City printing contracts and Dunlap Printing Company would obtain all of the election printing contracts for the City of Philadelphia. The scheme involved knowingly submitting non-competitive bids and the receipt by Mr. Osser of secret "commissions" of 5% of the gross amount of the contract awards for City printing obtained by Weiss Printing House. The mailings concerned the mailing of the checks by the City of Philadelphia to Weiss Printing House in payment for its services. The endeavoring to obstruct justice charge arises primarily from the contents of the taped telephone conversation and other alleged conversations testified to

by Mr. Freedman between Mr. Osser and Mr. Freedman during May of 1972.

The two indictments display no more than a thin veneer of similarity. They exhibit basic differences sufficient to establish separate and distinct offenses and indictments. The gravamen of each indictment emanates from two entirely different patterns of unlawful conduct. The earlier indictment primarily concerns extortionate schemes under 18 U.S.C. §1951 in regard to the purchase of voting machines from the Shoup Voting Machine Corporation. The fraudulent scheme under 18 U.S.C. §1341 involved in the present indictment concerns City contracts for printing of election materials and official City materials. The two indictments are obviously separate and distinct offenses in scope and subject matter. A basic difference also exists in the statutory violations alleged in the indictments. While both indictments allege mail fraud and conspiracy, the basic schemes giving rise to the fraudulent use of the mails and the conspiracies are disparate. Furthermore, the actual use of the mails is entirely different and separate. In the earlier indictment the mailing involved inviting and awarding bids on voting machines whereas in the instant indictment, the mailings involved City payments for contracts for public printing. In addition, in the earlier indictment the charge is based on Section 1951 of the Criminal Code whereas the present indictment is based on Sections 1341 and 1510. The length of time of the two alleged conspiracies although overlapping are for different periods of time. Finally, all possible co-conspirators except for the defendant and James Dunlap are dissimilar.

The differences in the basic facts, statutory violations, co-conspirators, and time periods of the two indictments

demonstrate that they are separate and distinct offenses and not interrelated. Although the fraudulent scheme and conspiracy in the later indictment was not committed subsequent to the extortionate scheme and conspiracy alleged in the first indictment as in *Hoffa*, I do not find this distinction controlling. As to the count for endeavoring to obstruct justice, however, the evidence is that this did occur subsequent to the time that Mr. Osser was indicted on the earlier indictment. Noteworthy also is the fact that the taped conversation was primarily of evidentiary value on the charge of endeavoring to obstruct justice.

Finally, in regard to the Sixth Amendment rights, the defendant argues that although he had no right to be arrested or charged, he was entitled to counsel at the time of the recording of the telephone conversation because the government investigation was complete at that time. As stated in *Hoffa, supra*, at 310:

> There is no constitutional right to be arrested.... Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction. (Footnote omitted).

I therefore conclude that no constitutional rights of the defendant were in any way violated by the admission into evidence of the electronically transcribed recording of the telephone conversation between Mr. Freedman and Mr. Osser.[2]

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[2] At least as to the "endeavoring to obstruct justice" charge, it was only then being investigated and apparently had not yet even reached the "probable cause" stage that would have justified issuing a warrant or the finding of an indictment.

II

Defendant claims that the evidence "with regard to the use of the mails in the alleged scheme to defraud" was insufficient to permit a conviction. This argument is predicated upon the theory that the use of the mails played a very minor part in the scheme to defraud and that the scheme could have been consummated without the necessity of utilizing the mails. As a corollary, defense also contends that the use of the mails was of such incidental value to the carrying out of the scheme as to be insufficient for the jury to find that the use of the mails was known or reasonably foreseeable by the conspirators as a part of the carrying out of the scheme to defraud. Somewhat similar contentions were made in the most recent decision by the Third Circuit Court of Appeals interpreting the mail fraud statute in *United States* v. *Ciotti*, No. 72-1486 (3rd Cir., decided Dec. 4, 1972). The circuit court rejected the argument in regard to a credit card mail fraud.

There was clear evidence upon which the jury could find that seven checks from 1968 through 1972 were mailed by the City Treasurer's Office to Weiss Printing House in payment for printing contracts that had been obtained by fraudulent bids. Each of these seven checks constituted a separate count of the indictment (counts 3 through 9 respectively). Defendant argues that since only seven checks were established as having been mailed, and since the evidence further shows that a total of one hundred five checks were received by Weiss Printing House pursuant to the fraudulent scheme from 1956 through 1972, the use of the mails was so minimal as to preclude a conviction. Assuming, arguendo, that the evidence might sustain a conclusion by the jury that a total of one hundred five checks were issued between 1956 and 1972 (although defense counsel does not "spell out" what testimony would

support such a conclusion), such does not logically establish, as defense contends, that *only* seven checks out of one hundred five checks were in fact mailed. In any event, a single use of the mails is sufficient to sustain a conviction if the use is a part of the scheme to defraud and is known or reasonably forseen. *United States* v. *Young*, 232 U.S. 155 (1914).

Witnesses from the City Treasurer's Office testified that all payment checks were routinely mailed unless a contractor made an express request that he be permitted to pick up the checks at the City Treasurer's Office. In the past eleven years, over 99% of all checks issued by the City Treasurer in payment for contract awards were mailed. Since 1968, the city maintained a check pick-up registry, which required that all checks picked up at the City Treasurer's Office be signed for and the date thereof noted. All other checks were mailed. The seven checks involved in counts 3 through 9, all executed and cashed during or subsequent to 1968, were found by the witness not to have been picked up. No checks that were presented to the witness to ascertain if they had been picked up were found to have been signed for, and therefore the jury was justified in concluding that all seven checks had in fact been mailed. This evidence does not establish, as defense claims, that only these seven checks and no others were mailed, or that all other checks were necessarily picked up. It is probably more logical to conclude that all checks were, but such determination is extraneous to the issues in this case. The evidence is most convincing that during the carrying out of the alleged fraudulent scheme, at least seven checks spanning a period of several years were mailed and were a part of the scheme to defraud.

The defendant was for many years a City Commis-

sioner, and it is clear that he was knowledgeable in the workings of the City government. There was clearly ample evidence upon which the jury could logically conclude that Mr. Osser either knew or reasonably foresaw that the mails would be used to make the payments to Weiss Printing House. The use of the mails, in fact, became a part of the carrying out of the scheme to defraud. The mere fact that the scheme could theoretically have been carried out by avoiding the utilization of the mails is no defense. The mails were repeatedly used during the continuance of the conspiratorial scheme to defraud. Receipt of payments by Weiss Printing House was an essential element of the scheme. Defendant was to receive his fraudulent payments by way of a secret 5% "commission" of the gross receipts of Weiss Printing House. Defendant's unlawful receipt of money was thus dependent upon Weiss Printing House obtaining its payments from the City, at least seven of which payments were established by sufficiently credible evidence for the jury to conclude that they had been mailed. The evidence is sufficient to establish that the defendant, along with others, devised a scheme to defraud, and for the purpose of executing such scheme caused to be delivered certain checks through the mail. This is all that the statute requires.

III

Defendant contends that the trial judge erred in refusing to instruct the jury that before the defendant could be convicted, the evidence would have to prove that the use of the mails was an *integral* part of the scheme to defraud, as opposed to the instruction given that the use of the mails had to be a part of the scheme to defraud, and had to be reasonably foreseen by the defendant. A review of the charge on the use of the mails is appropriate.

The court first read the relevant portions of the statute, 18 U.S.C. §1341. The court then advised the jury that as to the mail fraud counts (counts 3 through 9) the following elements, each of which had to be proved beyond a reasonable doubt were essential elements. (N.T. 7-34)

1. That there was devised a scheme or artifice to defraud the City of Philadelphia and its citizens in one of the ways alleged in the indictment.

That the defendant was a willing, voluntary and knowing participant in such a scheme.

2. That the United States Mails were utilized in carrying out the scheme to defraud. And

3. That the use of the mails in carrying out the scheme to defraud were either known or reasonably foreseen by the defendant as a part of a scheme to defraud.

Concerning the use of the mails, the charge commencing at page 7-36 of the trial transcript states:

> Count No. 3 specifically refers to a check that was mailed in January of 1968, addressed to Weiss Printing House, Inc., in the sum of $20,507.72 dated January 31, 1968.
>
> It is not necessary that the jury find that this is the exact date if the mailing occurred on or about the date alleged in the indictment and was within the five-year period from the date that the indictment was returned; and the indictment was returned on June 28, 1972.
>
> It is not necessary that the Government prove that either the defendant, Weiss or Freedman personally mailed the check if you should find beyond a reasonable doubt that the defendant caused it to be mailed, and if he either knew or reasonably foresaw that the mails would be utilized as a part of a scheme to defraud, and in carrying out the fraudulent scheme.

The use of the mails is an essential element of the charge, but any use of the mails if caused or brought about as a part of a carrying out of a scheme to defraud would be sufficient, and it is not essential that the actual mailing be made by the schemers or the active participants in the scheme.

* * *

For the purpose of executing these alleged frauds, the Government further charges that the defendant wilfully and knowingly caused to be delivered by mail certain checks payable to the Weiss Printing House, Inc., in various amounts.

The essential elements of the offenses charged in Counts 3 through 9 of the indictment, each of which elements the Government must prove beyond a reasonable doubt, are as follows:

* * *

The use of the mails in furtherance of the scheme to defraud is an essential element of the offense charged. You must find that the mails were in fact used to carry out the scheme, and that the use of the mails was reasonably foreseeable.

Use of the mails by the City of Philadelphia to forward a check payable to a contractor with whom the City does business is not in and of itself a violation of the law. The law prohibits the use of mails only in furtherance of an actual or intended scheme to defraud.

In determining whether a particular use of the mails has violated this section of the law, you must make a two-fold inquiry.

First: Was there a sufficient connection between the use of the mails and the scheme?

And, second, if so, was there a sufficient connection between the mail use and defendant?

In answering the first inquiry, should you find that the use of the mails was not a part of the scheme to defraud, nor the use of the mails reasonably foreseen, then it will be your duty to find the defendant not guilty on Counts 3 through 10.

In answering the second inquiry, should you find that the connection between the use of the mails and the defendant was neither a part of the scheme nor reasonably foreseen, then also it would be your duty to find him not guilty as to Counts 3 through 9.

Should you conclude that the defendant did not contemplate that the mails would be utilized as a part of a scheme to defraud, then he would not be guilty of Counts 3 through 9.

* * *

If you find beyond a reasonable doubt that the defendant, together with Leon Freedman and Fred Weiss . . . knowingly caused the mails to be used in furtherance of the scheme, and that this use of the mails was reasonably foreseen, then, assuming all other elements of the offense have been made out, you will be justified in finding that the defendant was in violation of those particular counts as to which you find there were actual mailings. . . .

Therefore, before the jury can find the defendant guilty of any of Counts 3 through 9, the jury must find beyond a reasonable doubt that the defendant Maurice S. Osser knowingly, willfully and intentionally joined in and became an active participant in a scheme or artifice to defraud . . . , and that in carrying out such a scheme or artifice to defraud the use of the mails was intended and reasonably foreseen by the defendant as a part of the scheme.

Neither the Supreme Court nor this Circuit has ever held that a jury must be instructed that the use of the

mails must be an integral part of the scheme to defraud.[3] In *Kann* v. *United States*, 323 U.S. 88, 95 (1944), the Court stated:

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which *the use of the mails is a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law. (emphasis added).

In *Pereira* v. *United States*, 347 U.S. 1, 8 (1954), the wording that the mailing need be no more than incidental to an essential part of the scheme was set forth:

> It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States* v. *Young*, 232 U.S. 155. Here, the scheme to defraud is established, and the mailing of the check by the bank, *incident to an essential part of the scheme*, is established. (emphasis added).

If by an integral part of the scheme defendant contends that the mailing must be an essential element of the scheme, it would appear that *Pereira* expressly holds to the contrary.

In *Parr* v. *United States*, 363 U.S. 370, 390 (1960), the court made clear that the mailing need only be a part of the fraudulent scheme or an incident to an essential element of the scheme.

> Therefore, only if the mailings were "a part of the execution of the fraud," or, as we said in *Pereira* v. *United States*, 347 U.S. 1, 8, were "incident to an essential part of the scheme," do they fall within the ban of the federal mail fraud statute.

In *Bannister* v. *United States*, 379 F.2d 750, 753 (5th

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[3] The only case brought to the court's attention requiring that the use of the mails be an integral part of the scheme to defraud is *United States* v. *Kelem*, 416 F.2d 346 (9th Cir. 1969), *cert. denied*, 397 U.S. 952 (1970), involving a "credit card" mail fraud.

(3r. 1967), *cert. denied*, 390 U.S. 927 (1968), the court ruled:[4]

> It is now, and has been for years, clear that the mailing element of the offense is satisfied if the use of the mails is an incident to a material element of the scheme.

If the mailing need only be "an incident to a material element of the fraudulent scheme," it would seem to mean something less than an integral part of the scheme. The true requisite is that the mails be used as a part of the carrying out of the scheme, and that such was either known or reasonably foreseen by the schemers. This was the nature of the instructions given to the jury, and the evidence clearly sustains a verdict on such an instruction. Receipt of the money by Weiss Printing House was clearly a material and essential element of the scheme. So far as Weiss Printing House was concerned, it was the ultimate goal of the scheme. As to the defendant, the receipt of his illegal "commissions" were dependent upon Weiss Printing House obtaining its payments. The jury was justified in concluding that Mr. Osser either knew or reasonably foresaw that the mails would be used to make payments to Weiss Printing House.

To instruct the jury that the mailings had to be an integral part of the scheme would have been the same as telling them that the use of the mails would be necessary to the completeness of the scheme to defraud, without which use of the mails the scheme could not have been carried out. *Funk and Wagnall's Standard Dictionary* defines "integral" in part as "constituting an essential part of the whole" and as "necessary to completeness."[5] The de-

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[4] The Hon. Albert B. Maris sat by designation.

[5] *Webster's Third New International Dictionary* defines integral as "of, relating to, or serving to form a whole: essential to completeness."

livery of the checks was and had to be an integral part of the scheme, but actual use of the mails for such delivery, if reasonably foreseen need only have been part of the scheme. An integral part of the crime is an actual and foreseeable use of the mails, but the use of the mails need not be an integral part of the scheme to defraud. The mails need only be used in executing the scheme, which may be only an incident to a material part of the scheme. Under defendant's contention, no mail fraud conviction could be sustained unless it was proved that the only way in which the scheme could be carried out was by use of the mails. No case has ever so held.

IV

Defendant contends that the charge as a whole was prejudicial. No such contention was made at the trial. Defendant made in substance but three requests for further instructions at the conclusion of the charge. First, defendant requested that the jury be told that it would have to acquit on the conspiracy charge if it acquitted on the mail fraud charges. In view of the fact that the jury convicted on all counts, this question becomes moot. Second, defendant requested the jury to be charged that the mail fraud charges could only be sustained if the jury should find that the use of the mails was an integral part of the scheme. This contention has been discussed in III above. Third, the defendant requested a further clarifying instruction concerning non-use of co-conspirators' out-of-court statements as proof of defendant's participation in the conspiracy. The requested further instruction was given in the verbatim language requested, immediately before the jury started its deliberations.

At oral argument, defense counsel in effect contended that the jury should have been instructed that unless the scheme to defraud was formed and carried out and had

the effect precisely as detailed in the lengthy indictment as to all the particulars, the verdict should be "not guilty." This argument is rejected. The jury need only find those elements requisite to make out the offenses charged and contained in the indictment.

The charge as a whole appears to fairly and adequately define the issues and duties to the jury. There was no suggestion or hint in the charge as to any particular verdict that the trial judge believed the jury should return. The necessity of finding all essential elements beyond a rasonable doubt before convicting was strongly emphasized. Many of the suggested points for charge submitted by defendant were adopted in the charge, and if anything, on some points would appear to have been more favorable to the defendant than required by law. There has been nothing shown in the charge as constituting "plain error."

The jury was selected with the utmost care. Defendant testified in his own behalf. A substantial number of "character witnesses" of excellent caliber were called. Defense counsel exhibited the highest degree of skill, diligence and effectivenss throughout the trial. The jury determined that the defendant was guilty beyond a reasonable doubt. That verdict was fully justified under the evidence and the applicable law. The Motion for a New Trial will be denied.

ORDER

And Now, this 18th day of December, 1972, defendant's Motion for a New Trial is Denied and Dismissed. The probation department is directed to deliver the pre-sentence report to the court. The defendant is directed to appear for sentence on December 20, 1972 at 10:00 A.M. in Courtroom #15, United States Courthouse, Philadelphia, Pennsylvania.

By the Court:

(s) (Illegible) J.

APPENDIX: EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1061

UNITED STATES OF AMERICA
v.
MAURICE S. OSSER
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 12, 1973
Before GIBBONS, ROSENN, and WEIS, *Circuit Judges*

BENJAMIN PAUL, ESQUIRE
FREDERIC J. BARNETT, ESQUIRE
MARK J. KADISH, ESQUIRE
GERALD ALCH, ESQUIRE
FOR APPELLANT
PETER F. VAIRA, ESQUIRE
FOR APPELLEE

OPINION OF THE COURT
(Filed Jul 30 1973)

ROSENN, *Circuit Judge*

This appeal primarily presents an unusual issue of
ther the Government's tapping of a telephone conv
tion between an indicted defendant and a potential
ernment witness in the absence of defendant's co
was in violation of the principles set forth in *Massi*

United States, 377 U.S. 201 (1964). We find the *Massiah* principles inapplicable to the circumstances presented here and affirm.

Defendant-appellant Maurice S. Osser served as a County Commissioner (title later changed to City Election Commissioner) in Philadelphia for more than two decades. During early 1972, a federal grand jury investigated various frauds on the city during Osser's term of office. The grand jury indicted Osser on February 25, 1972, for involvement in fraudulent schemes involving rigging of contracts for election machines. That indictment, as amended May 17 and May 24, 1972, led to another trial (District Court No. 72-349) in the Eastern District of Pennsylvania separate from the trial of the indictment involved in the present case.

Following presentment of the first indictment, the grand jury continued to hear evidence against Osser. In March 1972 it subpoenaed Leon Freedman in connection with an investigation of rigging of city council minutes and election ballot printing contracts. Freedman originally invoked the fifth amendment at the hearing, but later decided to cooperate with the Government after receiving a promise of immunity.

On May 17, 1972, Freedman received a telephone call from Osser. Osser, apparently unaware that Freedman had already decided to cooperate with the Government, urged him not to mention Osser's name to the grand jury. Osser visited Freedman the next day at Freedman's store. Freedman told Osser that he was going to see Government officials on May 19; Osser said he would call Freedman again to find out about that meeting.

Later on May 18, Freedman and his attorney met with a Department of Justice attorney and reported Osser's contacts with Freedman. The Government attorney asked Freedman if the Government could tape the expected

phone call from Osser. The attorney told Freedman his promised immunity would not be affected by his decision whether or not to consent to the taping. After meeting alone with his attorney, Freedman consented, was instructed how to operate a transmitter placed on his person, and had a recorder placed on his store phone. The Government gave Freedman no instructions on what he should say to Osser.

Osser called Freedman on May 19. He again pleaded with Freedman not to tell the Government of their previous commission splitting practices. The tape of the Freedman-Osser conversation was played in the trial of the case sub judice, following a hearing on, and denial of, a motion to suppress its use.

The grand jury on June 28, 1972, returned a second indictment against Osser, charging nine counts of mail fraud, 18 U.S.C. §§1341, 2, and one count of conspiracy, 18 U.S.C. §371, for his alleged involvement in rigging city printing contracts, and one count of endeavoring to obstruct justice, 18 U.S.C. §1510, based on his entreaties to Freedman. This indictment (District Court No. 72-384) led to the conviction under appeal here. Two mail fraud counts were dismissed at trial by the court; the jury returned guilty verdicts on the other nine counts. Osser was sentenced to two consecutive three year terms and fined $19,000.

The evidence at trial disclosed that Freedman, a salesman for Weiss Printing House, had sought Osser's assistance in 1957 to procure city council printing contracts for Weiss. Freedman subsequently paid one-third of his fifteen per cent commission from Weiss to Osser in return for his actions in guaranteeing the contract to Weiss. In 1965, Freedman's commission was increased, and he increased his payments to Osser to six and one-half per cent for about three years. The Osser-Freedman arrangement eventually also embraced election ballot print-

ing for the city. Splitting of Freedman's commission from Weiss continued through 1971.

In order to demonstrate the scheme's connection with the United States mails, a necessary element of the federal crime, the Government proved the means by which Osser received his payments. Philadelphia paid Weiss by check. Some of these checks were mailed. Weiss paid Freedman his commission by check; Freedman paid Osser in cash.

Appellant Osser claims reversible error was committed by the trial court both (1) in admitting into evidence the taped conversation between Osser and Freedman; and (2) in failing to instruct the jury that use of the mails must be an integral part of the alleged scheme to defraud.

I

Appellant's objection to the taped telephone conversation is two-fold: (A) Freedman's consent was insufficient to justify admission of the tape; (B) the taping deprived Osser of his right to counsel as set forth in *Massiah* v. *United States.*

A

Appellant's contention that Freedman's consent was insufficient is premised on the principle that taping of conversations of persons acting undercover for the Government is permissible only if those persons consent freely to the taping. *United States* v. *White*, 401 U.S. 745 (1971); *Lopez* v. *United States*, 373 U.S. 427 (1963); *Rathbun* v. *United States*, 355 U.S. 107 (1957); and 18 U.S.C. §2511 (2)(c):

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or *one of the parties to the*

communication has given prior consent to such interception. [Emphasis added.]

See also United States v. *Riccobene*, 320 F. Supp. 196, 202-203 (E.D. Pa. 1970), *aff'd per curiam*, 451 F.2d 586 (3d Cir. 1971).

Appellant argues that at the time Freedman consented to the taping, any consent he made could not have been voluntary because he had yet to receive officially his promised grant of immunity. Appellant further argues the Government attorney's assurance that immunity did not depend on whether or not Freedman consented to the taping was merely self-serving.

We find no basis in the suppression hearing record for reversing the district court determination that Freedman's consent was given voluntarily. Freedman himself testified clearly that he did not feel pressured by the Government request and that he believed his promised immunity would be forthcoming whether or not he consented. Nothing in the record indicates Freedman's belief was unwarranted. No implied threats were made to Freedman; he was not coerced. The present factual situation is thus quite different from that in *United States* v. *Laughlin*, 222 F. Supp. 264 (D.D.C. 1963). There, the consent to tape was found involuntary in light of the "consentor's" testimony that "I felt I had to cooperate," 222 F. Supp. at 266, under the implied threat of indictment if she did not. *Id.* at 268.

Although it is possible to imply from the circumstances of Freedman's consent that he hoped by continuing cooperation with the Government not to disturb forthcoming immunity, such hopes alone do not render his consent involuntary. Our inquiry on appeal is limited to whether the consent was voluntary and uncoerced, not whether the motivations for it were altruistic or self-seeking. As the court said with respect to hopes for

leniency in *United States* v. *Zarkin*, 250 F. Supp. 728, 737 (D.D.C. 1966):

> We can think of no time in which a party to a telephone conversation would permit the police to intercept that conversation when he, himself, would not seek something from the police in return, assuming he is of sound mind and knows the police are police. He might merely be seeking police protection from threatening phone calls. Or, he might be an undercover policeman who seeks his pay check. Or, indeed, he may be seeking leniency. However, so long as pressure is not initiated by the police for the purpose of overbearing the will of the party, this Court does not believe that the authorization given by the part is involuntary.

B

Appellant's second attack on admission of the tape of the telephone conversation at trial is based on a contention that the conversation was recorded after Osser was indicted and in the absence of his counsel, thus depriving defendant of his right to counsel's assistance at a critical stage of the prosecution. *Massiah* v. *United States*, 377 U.S. 201 (1964). Appellant argues that by virtue of his indictment on February 25, 1972, (which indictment was superseded by amended indictments on May 17 and May 24) the taping of his conversation with Freedman on May 19 was a pre-trial confrontation at which he had a right to counsel. He contends that this first indictment (District Court No. 72-349) was "cut from the same block of wood" as the subsequent indictment (District Court No. 73-384) that led to conviction in the case now appealed. Both indictments involved alleged activities of Osser in rigging city contracts between 1965 and 1972; one co-conspirator was named in both. Thus, argues appellant, the May 19 surveillance was part of the Government's

continuing investigation of the circumstances of the first indictment. Stripped of its legal trappings, appellant's disingenuous contention is that notwithstanding he initiated the telephone call to a potential witness for the Government in an alleged effort to obstruct justice and seal his lips in the ongoing investigation, taping of that conversation, even with the witness's consent, violated appellant's constitutional rights since he was not informed of the taping and afforded the benefit of counsel.

Appellant's effort to fit his situation into the mold condemned in *Massiah* is unavailing. Significant factual differences convince us that the exclusionary rule of *Massiah* should have no application here.

In *Massiah*, defendant was indicted for drug possession, pleaded not guilty, and was released on bail. A few days later, co-defendant Colson decided to cooperate with the continuing police investigation into Massiah and Colson's drug activities. Colson permitted Government agents to install a transmitter in his automobile and subsequently held a lengthy conversation with Massiah in the car. The tape of that conversation was introduced into evidence at Massiah's trial.

The Court held that Massiah had been deprived of his sixth amendment right to counsel because "there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited from him* after he had been indicted and in the absence of counsel." 377 U.S. at 206. [Emphasis added.] The Court compared the taping of Massiah's conversation with Colson to the coercive interrogation of defendant in the absence of counsel in *Spano* v. *New York*, 360 U.S. 315 (1959),[1] equating the "deliberate eliciting" of con-

[1] The five judge majority opinion in *Spano* had held petitioner's conviction could not stand on the basis of fourteenth amendment standards proscribing overbearing of a defendant's mind to obtain

fessions from Massiah with coercive interrogation. The court indicated the deprivation of the right to counsel in *Massiah* was even more grievous than its deprivation in coerced confession cases such as *Spano* because Massiah was unaware he was under interrogation. 377 U.S. at 206.

The crucial fact for the Court in *Massiah* was that the Government was *interrogating* the defendant. The interrogation was surreptitious so that Massiah himself was unaware that he was being questioned; but the consequences of the Government's actions were, therefore, more effective than had he been openly interrogated, and statements of incrimination were deliberately elicited from an already indicted, uncounseled defendant. The Court thus concluded that the requirement of presence of counsel applied in this pre-trial confrontation between Government and defendant just as it also applied at arraignment, *Hamilton* v. *Alabama*, 368 U.S. 52 (1969), and at preliminary hearing, *White* v. *Maryland*, 373 U.S. 59 (1963). *Massiah*, 377 U.S. at 205.

Massiah was clearly predicated on existence of the right to counsel after a defendant has been indicted. In the present case, at the time of taping, Osser had been indicted for none of the offenses for which he was subequently convicted. *Massiah* is applicable here only if we accept appellant's argument that the *Massiah* protection attached after his indictment in the separate suit involving election machine contracts (District Court Civil No. 72-349) and thus prevented the Government from using incriminating statements Osser made subsequently for prosecution of the present case (District Court No. 72-384). We reject that argument.

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a confession. The four concurring justices argued the fourteenth amendment also required presence of counsel at the interrogation in question. It was on the argument of the four concurring justices that Justice Stewart relied in *Massiah*. 377 U.S. at 204.

The district court discussed extensively the differences between the indictments in its memorandum opinion and order denying Osser a new trial as follows:

> The pending indictment for which Mr. Osser had engaged counsel at the time of the telephone conversation charged the defendant with interference with commerce by threat or violence and conspiracy under 18 U.S.C. §1951, and mail fraud under 18 U.S.C. §1341. In essence, that indictment charged that the defendant along with Thomas McHenry of the Shoup Voting Machine Corporation conspired from January 1965 to January 1972 to obstruct and affect commerce by extortion through the purchase of voting machines for the City of Philadelphia. In that eighteen count indictment, James Dunlap is named with respect to one overt act in one count in the alleged extortion violation of 18 U.S.C. §1951. The mail fraud involved the mailing of invitations to bid, awards to the Shoup Voting Machine Corporation and the mailing of bids to the Procurement Department of the City of Philadelphia.
>
> The present indictment under which Mr. Osser stands convicted involved mail fraud and conspiracy and endeavoring to obstruct justice. The named unindicted co-conspirators are Fred Weiss and Leon Freedman. The alleged conspiracy occurred between 1956 and 1972 in which it is charged that Mr. Osser as City Commissioner joined with the other conspirators whereby there would be fraudulent bidding for printing contracts, the essence of the scheme being that by "rigging bids," Weiss Printing House would obtain all of the official City printing contracts and Dunlap Printing Company would obtain all of the election printing contracts for the City of Philadelphia. The scheme involved knowingly submitting

non-competitive bids and the receipt by Mr. Osser of secret "commissions" of 5% of the gross amount of the contract awards for City printing obtained by Weiss Printing House. The mailings concerned the mailing of the checks by the City of Philadelphia to Weiss Printing House in payment for its services. The endeavoring to obstruct justice charge arises primarily from the contents of the taped telephone conversation and other alleged conversations testified to by Mr. Freedman between Mr. Osser and Mr. Freedman during May of 1972.

The two indictments display no more than a thin veneer of similarity. They exhibit basic differences sufficient to establish separate and distinct offenses and indictments. The gravamen of each indictment emanates from two entirely different patterns of unlawful conduct. The earlier indictment primarily concerns extortionate schemes under 18 U.S.C. §1951 in regard to the purchase of voting machines from the Shoup Voting Machine Corporation. The fraudulent scheme under 18 U.S.C. §1341 involved in the present indictment concerns City contracts for printing of election materials and official City materials. The two indictments are obviously separate and distinct offenses in scope and subject matter. A basic difference also exists in the statutory violations alleged in the indictments. While both indictments allege mail fraud and conspiracy, the basic schemes giving rise to the fraudulent use of the mails and the conspiracies are disparate. Furthermore, the actual use of the mails is entirely different and separate. In the earlier indictment the mailing involved inviting and awarding bids on voting machines whereas in the instant indictment, the mailings involved City payments for contracts for public printing. In addition,

in the earlier indictment the charge is based on Section 1951 of the Criminal Code whereas the present indictment is based on Sections 1341 and 1510. The length of time of the two alleged conspiracies although over-lapping are for different periods of time. Finally, all possible co-conspirators except for the defendant and James Dunlap are dissimilar.

As of May 19, 1972, the day the Osser-Freedman conversation was taped, Osser had not yet been indicted for any involvement in a scheme with Freedman to rig Philadelphia printing contracts. The Government was still in the process of investigating those alleged crimes, and Freedman was a vital link in the chain of evidence being accumulated. Therefore, when Freedman informed the Government not only that Osser was committing incriminating actions in connection with that crime, but also that he appeared to be in the process of committing the additional crime of endeavoring to obstruct justice, no sixth amendment constitutional impediment existed to continued investigation. The conversation was taped, providing relevant evidence for use against Osser in the subsequent trial both on the mail fraud and obstruction of justice counts. *Massiah* did not require suppression of use of that evidence in the trial because Osser's right to assistance of counsel had not yet attached since there was at that point no indictment on those charges.

The Supreme Court considered a similar *Massiah* claim in *Hoffa* v. *United States*, 385 U.S. 293, 309-10 (1966). A government informer had gathered evidence that defendant Hoffa was attempting to bribe jurors by sitting in his hotel room during the trial of the Test Fleet case. Subsequently, Hoffa was indicted for the bribery offense, and the informer's testimony was used against him. The Court dismissed with little difficulty defendant's assertion that *Massiah* prevented use of the informer's testimony be-

cause the informer had collected the evidence at a point after the right to counsel had attached. Although the Court spoke in terms of the defendant not having a right to be arrested — and thus have the right to counsel attach — prior to the time the informer gathered his information, implicit in its decision is the principle that the indictment in the Test Fleet case did not create a right of counsel which was violated in procuring information for a new, separate indictment.

A similar *Massiah* claim was denied in *Vinyard* v. *United States*, 335 F.2d 176 (8th Cir.), *cert. denied*, 379 U.S. 930 (1964). Vinyard, arrested for refilling liquor bottles, subsequently attempted to bribe two government agents. The original charge was not tried, but the bribery charge resulted in a conviction. Vinyard argued that the agent testimony about the bribery was of a post-arrest, uncounseled statement to government agents, which could not be introduced at trial under the *Massiah* principle. The court rejected the claim on the ground *Massiah* only applied to post-indictment statements used to prove the offense for which defendant had originally been indicted.

It is true that in both *Hoffa* and *Vinyard*, the subsequent statements to government agents concerned crimes completely different from those originally charged. Appellant here argues that both cases are therefore distinguishable because the Osser-Freedman tape was used not only to prove the obstruction of justice charge, but also the printing contract rigging charge, which was in some respects similar to the previously charged election machine contract rigging charge. Appellant argues that to find *Massiah* inapplicable here would provide a "gaping loophole" since the Government could always separate multiple charges in related criminal activity, indict on some

charges, continue investigations on the other charges, and thus collect uncounseled statements from the defendant.

We do not find such a gaping loophole created by our determination that the tape was admissible against Osser on all charges in the present case. The two indictments were significantly separable and different; we do not consider the crimes alleged in each to be multiple charges in related criminal activity. No indication exists that in taping the Freedman-Osser conversation the Government anticipated or sought further information to be used in the trial of the election machine rigging indictment.[2] Under these circumstances, we believe the principles enunciated in *Hoffa* and *Vinyard* are applicable to distinguish the present case from *Massiah*.

II

Appellant's final contention is that the trial judge's instructions to the jury on the necessary elements of use of the United States mails in the mail fraud counts was insufficient. Appellant argues that the trial judge instructed only that proof was needed to show

> the use of the mails in carrying out the scheme to defraud were either known or reasonably foreseen by the defendant as a part of the scheme

when it was required that he instruct use of the mails was an "integral" part of the scheme. Appellant argues this error was crucial since evidence of use of the mails was limited to proof that seven of ninety-eight checks from Philadelphia to Weiss Printing House happened to be mailed. Thus argues appellant, the jury under proper instructions might well have concluded that use of the mails was never foreseen as an "integral" part of the scheme.

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[2] We are not presented with the question whether the tape could have been played in trial of the election machine contract rigging charges since the tape was not entered into evidence in that case.

Viewing the trial court's instructions as a whole, *United States* v. *Thomas*, 451 F.2d 760, 762 (3d Cir. 1971), we find no error. The court instructed, *inter alia*, that "use of the mails is an essential element of the charge... the Government must prove beyond a reasonable doubt that the defendant caused to be delivered by mail an envelope addressed to Weiss.... You must find that the mails were in fact used to carry out the scheme, and that the use of the mails was reasonably foreseeable.... you must make a two-fold inquiry. First: was there a sufficient connection between the use of the mails and the scheme? And, second, if so, was there a sufficient connection between the mail use and the defendant?" The court's instructions therefore fully apprised the jury of the necessity of finding a connection between the scheme and foreseeable use of the mails. The charge was fully consistent with the elements of the crime established by 18 U.S.C. §1341, as set forth in *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954). We find no error.

Appellant Osser has belatedly raised in his reply brief an asserted error to which the Government has had no opportunity to respond. He claims error in admitting the Freedman-Osser conversation tape as substantive, rather than corroborative, evidence. At trial, Freedman did not testify as to his recollections of the conversation, although he did identify the tape as an accurate recording of the conversation. Defense counsel stated at trial, "I submit that the correct method would be to ask the witness [Freedman] what his personal recollection is of the tape recording." He did not, however, press the point; instead, he argued to the court what type of testimony from Freedman was required to lay a proper foundation of accuracy and completeness of the tape, as is required for its admission, citing *United States* v. *McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958).

We find no merit in this final contention of appellant. Nowhere in *McKeever*, or in the other cases relied on by appellant, *United States* v. *White*, 401 U.S. 745 (1971); *Lopez* v. *United States*, 373 U.S. 427 (1963); and *Bakes* v. *United States*, 350 F. Supp. 547 (N.D. Ill. 1972); do we find any indication that taped telephone conversations can be used only as corroborative evidence. *See especially Lopez*, 373 U.S. at 440 n. 12; and *White*, 401 U.S. at 753:

> Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1061

UNITED STATES OF AMERICA
v.
MAURICE S. OSSER,
APPELLANT

(D. C. Criminal No. 72-384)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, ROSENN AND WEIS, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 21, 1972, be, and the same is hereby affirmed.

ATTEST:

(s) M. ELIZABETH FERGUSON

Chief Deputy Clerk

July 30, 1973

APPENDIX: EXHIBIT C

Constitutional and Statutory Provisions

Sixth Amendment to the United States Constitution:

AMENDMENT VI — *Jury Trial For Crimes, and Procedural Rights*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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18 U.S.C., Sec. 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C., Sec. 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, ex-

change, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C., Sec. 1342:

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C., Sec. 1510:

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats therof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute

of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigaions of or prosecutions for violations of the criminal laws of the United States.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-377

MAURICE S. OSSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a taped telephone conversation was improperly introduced at trial as substantive evidence and that its acquisition in the absence of his attorney deprived petitioner of his right to counsel.

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner, then City Election Commissioner for Philadelphia, was convicted of mail fraud, conspiracy and endeavoring to obstruct justice, in violation of 18 U.S.C. 1341, 371 and 1510. He was sentenced to two consecutive three year terms of imprisonment and fined $19,000. The court of appeals affirmed (Pet. App. B).

The facts, which are set forth in the opinion of the court of appeals (Pet. 33-35), show that Leon Freedman, a salesman for Weiss Printing House, had sought petitioner's

assistance to procure city council printing contracts for Weiss. Freedman subsequently paid one-third of his fifteen per cent commission from Weiss to petitioner in return for petitioner's actions in guaranteeing the contract to Weiss. In 1965, Freedman's commission was increased, and he increased his payments to petitioner to six and one-half per cent for about three years. This arrangement eventually was expanded to embrace election ballot printing for the city.

During early 1972, a federal grand jury investigated various frauds on the city during petitioner's term of office. The grand jury indicted petitioner on February 25, 1972, for involvement in fraudulent schemes involving rigging of contracts for election machines. That indictment, as amended May 17 and May 24, 1972, led to another trial in the Eastern District of Pennsylvania separate and distinct from the charges and trial of the indictment involved in this case.

Following presentment of the first indictment, the grand jury continued to hear evidence against petitioner. In March 1972 it subpoenaed Freedman in connection with an investigation of rigging of city council minutes and election ballot printing contracts. Freedman originally invoked the Fifth Amendment at the grand jury hearing, but later decided to cooperate with the government after receiving a promise of immunity.

At trial, Freedman testified that in mid-April 1972, petitioner called him and arranged a meeting for the next morning (Tr. 84). At that meeting, petitioner asked Freedman if he had been interviewed by government investigators; he urged Freedman, on the basis of their long friendship and Freedman's own best interests, not to say anything about their prior dealings (Tr. 86). On the evening of May 17, 1972, petitioner again called Freedman.

He inquired about Freedman's next visit to the Department of Justice Strike Force Offices and pleaded with Freedman not to say anything (Tr. 87). Freedman told petitioner that he had an appointment to see the Strike Force attorneys on Friday morning, May 19, 1972. Petitioner told Freedman that petitioner's life depended on Freedman's silence because he stated that he would rather commit suicide than go to jail (Tr. 87). On the following morning, May 18, 1972, petitioner visited Freedman's store and again pleaded with Freedman to say nothing (Tr. 87). On Friday afternoon, May 19, Freedman received another phone call from petitioner which he had given the federal agents permission to tape record (Tr. 88).

After Freedman testified that this tape (G. Ex. 3) contained an exact recording of his conversation with petitioner on May 19, 1972, the tape was received in evidence at the instant trial (Tr. 108), and then played for the jury (Tr. 118-134). It detailed additional efforts by petitioner to find out what Freedman was telling the government agents (Tr. 118-120, 122, 124, 127-128) and to persuade Freedman to remain silent (Tr. 124, 130, 132, 134).

1. Petitioner's claim that the taping deprived him of his right to counsel under *Massiah* v. *United States,* 377 U.S. 201, is thoroughly discussed and correctly rejected in the opinion of the court of appeals (Pet. App. 37-44), upon which we rely.

2. The additional claim that the tape was improperly used as direct evidence is frivolous. Petitioner's contention on this issue appears to be that, prior to the introduction of the tape, Freedman "did not testify on the subject matter of the recorded conversation but merely identified the tape. The recording itself was introduced as substantive evidence" (Pet. 11). The appropriate procedure, it is asserted, would have been to ask Freedman his re-

collection of the tape recording first, and then admit it. But Freedman testified that during a recess which proceeded his testimony, he had listened to the tape and that to his recollection it was an exact recording of the conversation (Tr. 107-108). Exactly how petitioner was prejudiced by the precise manner in which the tape was admitted is not made clear. His claim was properly rejected by the court of appeals (Pet. App. 46).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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